Unlicensed Division, District No. 1–MEBA/NMU, AFL–CIO (Mormac Marine Transport, Inc.) *and* Francis J. Wojcik. Case 34–CB–1495

September 30, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On April 2, 1993, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and record in light of the exceptions and brief and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to modify the remedy for the reasons stated below.

We agree with the judge for the reasons stated in his decision, that the Respondent breached its duty of fair representation by handling Wojcik's grievance in a perfunctory manner. Our finding is based on the unique combination of facts in this case. Thus, the credited evidence shows that the Respondent assured Wojcik in March 1991, and again in May, that his grievance would be looked into and handled.[3] Yet, the Respondent took absolutely no action on the grievance until December 1991, when the Respondent finally began its investigation. On these facts, we find that the Respondent's inaction amounted to more than mere negligence.

The Respondent's contention that many grievances in the maritime industry take a year to *resolve* is not germane to this case because here it took 9 months for the Respondent to begin even to *investigate* Wojcik's claim. In addition, we note that if the Respondent had found that Wojcik's grievance had merit, the Respondent's failure to act for 9 months may have foreclosed the opportunity to present Wojcik's grievance to the Company because of the contractual time limits[4] governing the grievance procedure.[5]

At the unfair labor practice hearing before the administrative law judge, the Respondent exercised its option under *Rubber Workers Local 250 (Mack-Wayne Closures) (Mack-Wayne II)*, 290 NLRB 817 (1988), to defer litigation of the merits of Wojcik's grievance to the compliance stage of this proceeding. We find that the recommended Order should be modified. When, as in the present case, the General Counsel has met the initial burden of proving that an employee's grievance was not clearly frivolous,[6] the Board will permit the respondent union to litigate the ultimate merits of the grievance at either the initial unfair labor practice stage or the compliance stage of a proceeding. If the union elects to defer litigation until the compliance stage, it is customary and appropriate to include a provisional make-whole remedy in the Board's order. See *Service Employees Local 87 (Cervetto Maintenance)*, 309 NLRB 817 (1992); *Mack-Wayne II*, supra at 821; and *Rubber Workers Local 250 (Mack-Wayne Closures) (Mack-Wayne I)*, 279 NLRB 1074, 1075 (1986). Accordingly, we shall modify the judge's remedy to provide that: (1) the Respondent shall request Mormac Marine Transport, Inc. to reinstate Wojcik; (2) if Mormac refuses, the Respondent shall promptly pursue grievance and arbitration proceedings in furtherance of Wojcik's claim; (3) Wojcik shall be permitted his own counsel in grievance and arbitration proceedings, if he so chooses, and the Respondent shall reimburse him for reasonable legal fees of such counsel; and (4) if for any procedural or substantive reason the Respondent is unable to pursue the grievance and arbitration procedure, it shall make Wojcik whole for any losses suffered from the unlawful failure to process his grievance. Interest on any amounts owed by the Respondent to Wojcik shall be computed in the manner proscribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[1] The Respondent excepts to the judge's failure to grant its motion to strike par. 9 of the complaint because although par. 9 refers to conduct set forth in par. 7, par. 7 does not contain any description or allegation of the Respondent's conduct. The reference to par. 7 is an obvious typographical error; ''paragraph 7'' clearly should have read ''paragraph 8.'' Such an inadvertent error should not affect the outcome of the case where the Respondent has not been prejudiced because of the error. For these reasons, the Respondent's motion to strike par. 9 of the complaint is denied.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the judge's findings. We note that in its brief, the Respondent relies in part on discredited evidence.

[3] The Respondent argues that the judge's reliance on any action or inaction prior to May 21, 1991, is improper because the complaint does not allege that the Respondent breached its duty of fair representation prior to that date. Although we agree that any particular action or inaction occurring before May 21 cannot alone constitute a violation of the Act, we find that the judge could properly consider the events occurring before May 21 as a context for the Respondent's later conduct. We find that the judge properly relied on the events occurring prior to May 21 as background information only.

[4] The contract provides that, in the absence of extenuating circumstances, all grievances must be presented no later than 30 days after the ship ''pays off.'' The ship ''paid off'' in this case on March 7, 1991.

[5] Member Devaney does not rely on this factor because he declines to speculate on the timeliness of Wojcik's grievance had the Respondent submitted it to the Company. In his view, the offense centers on the Respondent telling the employee that his grievance would be processed with the Company when, in fact, according to the credited evidence, the Respondent took no action for 9 months.

[6] In finding that the Respondent breached its duty of fair representation and violated the Act, the judge implicitly concluded that the General Counsel established that Wojcik's grievance was not clearly frivolous. We agree that the record establishes that the grievance was not frivolous.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Unlicensed Division, District No. 1–MEBA/NMU, AFL–CIO, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Insert the following paragraphs 2(a), (b), and (c) and reletter the remaining paragraphs.

''(a) Request Mormac Marine Transport, Inc. to reinstate Francis Wojcik and, if that employer refuses to reinstate Wojcik as requested, promptly pursue the grievance procedure, including arbitration, in good faith with all due diligence.

''(b) Permit Francis Wojcik to be represented by his own legal counsel in the grievance and arbitration procedure, and pay the reasonable legal fees of such counsel.

''(c) In the event it is not possible to pursue the remaining stages of the grievance procedure, resulting in the inability to resolve the grievance of Francis Wojcik on the merits, make Wojcik whole, with interest, for any loss of pay he may have suffered as a result of its unlawful conduct in failing to process his grievance.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to represent employees in collective-bargaining units which we represent, by failing to take action on behalf of such employees for reasons which are arbitrary, invidious or unfair.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of their rights under Section 7 of the Act.

WE WILL request Mormac Marine Transport, Inc. to reinstate Francis Wojcik and, if that employer refuses to reinstate Wojcik as requested, WE WILL promptly pursue the grievance procedure, including arbitration, in good faith with all due diligence.

WE WILL permit Francis Wojcik to be represented by his own counsel in the grievance and arbitration procedure, and WE WILL pay the reasonable legal fees of such counsel.

WE WILL make Francis Wojcik whole, with interest, for any loss of pay he may have suffered as a result of our unlawful failure to process his grievance, if it is not possible to determine the merits of that grievance through the grievance and arbitration procedure.

UNLICENSED DIVISION, DISTRICT NO. 1–MEBA/NMU, AFL–CIO

John Gross, Esq., for the General Counsel.
Sidney H. Kalban, Esq. (Phillips, Cappiello, Kalban, Hoffmann & Katz, P.C.), for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on December 16, 1992, and February 1, 1993. The complaint and notice of hearing, which issued on September 27, 1991,[1] and was based on an unfair labor practice charge filed on July 24 by Francis Wojcik, alleges that since on or about May 21, Unlicensed Division, District No. 1–MEBA/NMU, AFL–CIO (the Union) has arbitrarily failed to process a grievance regarding Wojcik's discharge from his employment with Mormac Marine Transport, Inc. (the Company) in violation of Section 8(b)(1)(A) of the Act.

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The Company, a Connecticut corporation with an office and place of business in Stamford, Connecticut, is engaged in the interstate and foreign marine transport of bulk oil and other freight. During the 12-month period ending August 31, the Company received revenues in excess of $50,000 for the performance of services in transporting freight in interstate and foreign commerce. Respondent admits, and I find, that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

The Company operates bulk tankers, the *Mormac Star*, the *Mormac Sun*, and the *Mormac Sky*, which transport oil and other commodities to United States and foreign destinations. Wojcik was employed on the *Mormac Star* in 1986; he began working on the *Mormac Sky* in about 1990 as a bosun. Basically, the bosun is responsible for the maintenance and upkeep of work on the deck of the vessel. Wojcik was fired by the Company on March 7; it is alleged that Respondent failed to properly represent him regarding this discharge, in violation of Section 8(b)(1)(A) of the Act.

At the commencement of the hearing, counsel for Respondent elected to litigate the merits of Wojcik's grievance at a possible subsequent compliance hearing pursuant to *Rubber Workers Local 250 (Mack-Wayne Closures) (Mack-Wayne II)*, 290 NLRB 817 (1988). Regardless, there was a

[1] Unless indicated otherwise, all dates referred to here relate to the year 1991.

considerable amount of testimony (from both sides) about the events of March 6 and 7, when the Company fired Wojcik. Suffice it to say that Wojcik testified that after directing and assisting the crew in pulling up the lines, he went to clean out a spray gun with vinyl thinner because he had been spray painting with it earlier. While cleaning the spray gun the vinyl thinner (highly toxic) got on his pants and into his shoes. He immediately went to his cabin to clean his clothes and feet of this chemical. He remained there for a short time in order to remove this chemical. Respondent's letter of termination states that he was terminated for ''being absent from your supervisory duties'' on that day. The letter also states: ''You have repeatedly displayed a lack of good judgment in the performance of your duties, and seem altogether indifferent to your responsibility for the deck gang and their endeavors.'' Since Respondent elected to litigate this matter at a possible subsequent compliance specification, no decision will be made regarding the merits of Wojcik's grievance.

On March 7, after Wojcik was paid, but before he left the ship, he met Louis Tapogna, the husbanding manager for the Company. Wojcik told him what had occurred and Tapogna told him that there was nothing he could do at that time, that he should take it up with the Respondent when he went ashore and returned home to Maryland.

Wojcik called the Respondent's office in New York on March 12 and spoke to Al Leit, a patrolman in the port of New York for Respondent.[2] He told Leit that he was terminated by the Company and wanted to know what he had to do ''in order to get the situation straightened out.'' Leit told him that he had to come to New York to file a grievance. Wojcik said that he had just been released from a hospital and was under a doctor's care and did not know when he would be able to come to New York to file the grievance. Leit told him that he would have to come to New York as soon as possible to file a grievance. Wojcik next called the Respondent's office on March 18; he asked Leit if he had spoken to Nicholas LaForgia, Respondent's branch agent, to learn if anything had been done regarding his grievance. Leit said that LaForgia was not in, but that he would take care of the matter as soon as he possibly could.

His next contact with Respondent was on May 21, when he went to Respondent's office in New York.[3] He met with Leit and said that he was there to follow through with the grievance. He asked if anything had been done with his grievance, and was told that nothing was done, that he should prepare and file the grievance. Leit also said that because the contractual 30-day time period had already elapsed, it was possible that the grievance would fail. Wojcik gave Leit the doctor's two letters to establish that he could not get to New York any earlier and Leit said that the letters would probably have a bearing on his filing a grievance. Leit then gave Wojcik a grievance form which he filled out and returned to Leit. Leit made no comment on the contents of the grievance.

Wojcik returned to Respondent's hall on May 30; on that occasion he met with LaForgia and asked him whether the grievance he prepared had been processed. He testified that LaForgia then asked whom he gave the grievance to, and Wojcik said that he gave it to Leit. LaForgia then asked Leit if he had Wojcik's grievance and he said that he did. LaForgia asked if Leit had done anything about it and he said that he had not. When LaForgia asked why he had not done anything about it, Leit said: ''I was waiting for you.'' Leit gave LaForgia the grievance; after reading the grievance, LaForgia told Wojcik that it was improperly filled out because he should have written that he was discharged without just cause rather than stating the reason that he was given by the Company for the termination. Wojcik asked LaForgia to try to get the matter straightened out and LaForgia said that he would look into the matter and discuss it with the Company. Wojcik said that he would prepare a new grievance, as directed, and mail it to him. LaForgia testified that May 30 was the first time he was told that Wojcik had been fired by the Company. On that day, Wojcik told him that he wanted to present a grievance over his termination. He read the grievance that Wojcik had prepared earlier and told him that it wasn't proper because ''he didn't list anything,'' for example, why he was fired. He told Wojcik to prepare another grievance.

Within a few days, Wojcik sent a new grievance (five pages) to the Respondent; it was stipulated that Respondent received it on June 7. Wojcik's next contact with the Respondent was on July 9, when he called and spoke to LaForgia. He testified that he asked LaForgia if anything was done on his grievance and was told that nothing was done, that he had not had the time to contact the Company. He asked for another week to contact the Company and attempt to correct the situation, and Wojcik agreed. Having received no response from the Respondent, Wojcik sent them a letter on July 22. The letter, basically summarizes the events stated above and states:

> Since my dismissal, over 30 days has elapsed from the time the Union was officially notified to represent me as a Union member, by taking this matter up with the company.
>
> I do not feel as if I had been treated fairly in regards to my employment with this company and wish to be informed by the Union as to the final outcome.

Wojcik received no response to this letter and had no contact with the Respondent, oral or written, until he received a letter dated February 14, 1992, from Sidney Kalban, counsel for the Respondent.

LaForgia testified that after he received the corrected grievance, he wrote to Tapogna, by letter dated June 11, enclosing a copy of Wojcik's grievance, requesting: ''Please send me all information in regards to Mr. Wojcik discharge as Bosun.'' Tapogna testified that he never saw this letter prior to October 1992, when counsel for the General Counsel showed it to him in preparation for this trial. LaForgia testified that about 10 days after sending this letter he called the Company and spoke to Taponga. He said: ''I sent you a letter of grievance on a bosun. I haven't heard anything.''

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[2] Leit had a stroke in about April 1992. He is presently totally disabled and is residing in a nursing home. He did not testify.

[3] Wojcik obtained two letters from his physician. The first, dated March 13, states that he has recurrent chest pain and was unfit for duty. The other, dated May 17, states that for the prior 2 months, Wojcik has been on a number of medications and restricted from travel. It concludes: ''Recent tests and evaluation indicated that he is currently fit to resume his normal duties as of May 20, 1991.''

Taponga said that he had received the letter and grievance, would look into it and get back to him. Shortly after receiving Wojcik's call on July 9, LaForgia called Taponga again and he again said that he would get back to him, but never did. He had no further discussions with Taponga relating to Wojcik's grievance and Taponga never told him that because the 30-day period after the discharge had passed, any grievance would be rejected as untimely.[4] Wojcik filed the instant unfair labor practice charge on July 24; at that time LaForgia ''turned everything over to the attorneys.''

Tapogna testified that his first contact with LaForgia regarding Wojcik's discharge and grievance, was in September, when LaForgia called him and asked for a copy of the dismissal letter given to Wojcik. On September 19, Taponga faxed him the dismissal letter, together with a letter of warning dated February 26, that was given to Wojcik. He again heard from LaForgia in July 1992 when LaForgia called him and requested the ship's itinerary. When Taponga asked him why he needed it, LaForgia said that Wojcik was suing the Union and ''giving me some problems.'' At that time, Taponga faxed the ships itinerary to LaForgia. He never had a conversation with LaForgia where he told him that the ship would be in Tampa, Florida, on a certain date; however, he speaks regularly to the Respondent's dispatcher and may have told her that the ship would be in Tampa at a certain time. He was never told that a grievance was going to be filed over Wojcik's termination, and never told LaForgia that he would look into Wojcik's grievance. The Company did not receive a copy of the unfair labor practice charge that was filed by Wojcik. The first he learned of it was at the end of August when he received a telephone call from the Board agent handling the matter.

LaForgia testified: ''After I found out about the Labor Board, we investigated it thoroughly and I sent my branch patrolman down to the ship to get statements.'' After receiving the Labor Board charge he attempted to learn where the ship was located in order to interview members of the crew. In this regard, he called Taponga to learn the destination of the ship.[5] At some point, he learned that the ship would be in the shipyard in Tampa, Florida, at the beginning of December, and he sent Respondent's patrolman, Enrico Esopa, to interview the crew. Esopa testified that he was sent to Tampa in late November or early December to interview members of the crew of the *Mormac Sky* who were present on the ship on March 6. When he arrived at the ship on about December 2, he learned that none of the crewmembers who were present when Wojcik was fired were aboard the ship. However, he spoke to crewmembers Ramos and Lambert who had worked with Wojcik at an earlier time and they told him that Wojcik would give them assignments and then they wouldn't see him again for several hours. Esopa then went to see the captain of the ship who gave gave him a list of the crewmembers, and when he returned to his office he attempted to call some of these men. He contacted one—Houlemard—who told him that Wojcik assigned the work and was never seen again. Houlemard prepared a statement for the Respondent saying that on March 6, after Wojcik assigned him his work, he did not see Wojcik for the rest of the evening. Esposa also contacted crewmember Sidney Zuniga by phone, and he also said that he was pulling lines, but did not see Wojcik. Esopa met with crewmember Jeffrey David at Respondent's hall and David told him the same story as Zuniga, that he did not see Wojcik while he was pulling lines on March 6. Esopa also met crewmember Roch at Respondent's hall. Roch reported that after they completed pulling the lines on March 6, they stood around the paint locker for about 25 minutes looking for Wojcik. They met the chief officer, who was also looking for him.

Prior to his employment with Respondent, Esopa was employed as a seaman and as a bosun for 3 years. He had also been employed on the *Mormac Sun* and the *Mormac Sky*, in 1984. He testified that in his experience, a spray gun should be cleaned ''right away,'' because the paint dries within 20 minutes of its application. Additionally, a spray gun should not be cleaned while the crew is pulling lines, ''because it's an all hands operation to pull lines. That requires the entire deck department.'' He testified that after his investigation: ''I kept wondering why he was cleaning a spray gun when the rest of the crew was pulling lines up. He should have been with the rest of the crew pulling lines.'' After obtaining statements from the above named crewmembers, Esopa and LaForgia forwarded this information to Attorney Kalban for final decision. However, prior to doing so, LaForgia and Esopa discussed the matter and each determined that Wojcik's grievance had no merit.

By letter dated February 14, 1992, Attorney Kalban notified Wojcik that Respondent ''has now completed its extensive investigation of your complaint regarding your discharge . . . not merit being processed any further.'' The letter also states that Respondent contacted crewmembers on duty on March 6 and each one stated that Wojcik was not seen after directing the crew on what to do, and that the Respondent was unable to locate any crewmember who saw him on deck during that period. The letter concludes: ''Under these circumstances, the Union has concluded that your grievance lacks merit to be brought to arbitration even assuming that you had filed it timely.''

IV. ANALYSIS

It is by now well settled that a union owes a duty of fair representation to all employees in bargaining units that it represents, and that duty is breached, and the law is violated, when the union engages in conduct that is ''arbitrary, discriminatory or in bad faith.'' *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). It is often difficult, however, to determine whether a union's actions or inactions crossed the lines from permissible to impermissible. It is clear, though, that a violation occurs when the union's actions or inactions are caused by the individual's intraunion activities. It is also clear that in order to establish a violation in duty of fair representation cases such as the instant matter, the General Counsel must establish more than ''mere negligence'' or poor judgment in the union's handling of the grievance. *Rainey Security Agency*, 274 NLRB 269 (1985). ''Something more is required.'' *Diversified Contract Services*, 292 NLRB 603, 605 (1989). But, as the Board stated in *Office Employees Local 2*, 268 NLRB 1353, 1355 (1984): ''Exactly when union conduct constitutes 'something more than mere negligence' is not

[4] The collective-bargaining agreement between the parties states: ''Unless extenuating circumstances exist, all grievances shall be presented no later than thirty (30) days after the ship pays off.''

[5] Admittedly, a tramp tanker, such as the *Mormac Sky*, is subject to being sent anywhere at any time without prior notice, and is often difficult to track.

susceptible to precise definition.'' In *Diversified*, supra, the Board found no violation even though the union's handling of the grievance was ''far from model union grievance handling'' and was ''possible mismanagement on the union's part.''

I find that General Counsel has established that Respondent's actions (or rather inaction) toward Wojcik's attempt to file a grievance was more than mere negligence. Although the cases establish that this is a difficult burden to establish, I cannot envision a more convincing case for a violation, other than one involving the more obvious kind of violation, one caused by discrimination for a member's intraunion activity. Wojcik called Leit on March 12 and asked what he could do about his discharge 5 days earlier and Leit told him that he would have to come to the Respondent's office in New York to file a grievance, even though Wojcik told him that he had just been released from a hospital, was under a doctor's care, and was not permitted to travel. Respondent never explained why they could not mail Wojcik a grievance form that he could return by mail. Instead, they did nothing. Wojcik called Leit again 6 days later and asked if anything had been done with his attempt to file a grievance; nothing had been done, but Leit said that he would take care of the matter as soon as he possibly could. Wojcik came to New York on May 21 and met with Leit. He gave him the letter from his doctor stating his travel restrictions. He asked if anything was done on his grievance and was told that nothing had been done. Leit also gave him a grievance form which he filled out and returned to Leit.

Wojcik returned to Respondent's hall on May 30 and asked LaForgia if his grievance had been processed. He knew nothing about it and asked Leit if he had done anything with the grievance, and Leit said that he had not. LaForgia read the grievance and told him that it was improperly filled out because he did not properly state the reason for his discharge and he gave Wojcik a new form to prepare another grievance. Within a few days, Wojcik prepared a new grievance which he mailed to the Respondent; they received it on June 7. Having heard nothing from Respondent, Wojcik called LaForgia on July 9 and asked if anything had been done on his grievance and was told that nothing had been done, but he asked for another week to attempt to straighten out the situation. Having again not heard from the Respondent, Wojcik wrote a letter to Respondent, dated July 22, requesting to be informed of the outcome of his grievance. Again, he received no response. The unfair labor practice charge was filed 2 days later. The only response he ever received from Respondent was the February 14, 1992 letter from counsel for Respondent that his grievance lacked merit. This was 11 months after he first contacted Leit about his grievance.

Respondent defends that after Wojcik rewrote his grievance in the allegedly proper manner, LaForgia wrote to Taponga on June 11 requesting information on Wojcik's discharge, and called him on two subsequent occasions on the subject, but never received any of this information from the Company. Taponga denies ever receiving the letter or telephone calls from LaForgia. I would credit the testimony of Taponga over that of LaForgia. Taponga had nothing to gain by appearing at this hearing and testifying as he did. In fact, the Union represents his employees and he has to continue dealing with LaForgia and other representatives of Respondent. In addition, his testimony is more believable than that of LaForgia. If LaForgia had written to him and called him twice (as LaForgia testified) why would Taponga not respond? He could simply have said that he would not accept the grievance because it was untimely. I therefore credit Taponga and find that LaForgia never sent the June 11 letter and never called him about Wojcik's grievance.

Respondent therefore did absolutely nothing regarding Wojcik's grievance until December. That was after three telephone calls to Respondent, two visits to Respondent's hall, and two letters to Respondent. Additionally, Respondent's only response to Wojcik's grievance did not come until 2 months after the complaint in this matter issued.[6] General Counsel has a difficult burden in DFR cases such as the instant matter. He must show something more than mere negligence, mismanagement, or sloppy grievance handling. When a union has done absolutely nothing on a grievance for almost 9 months, although requested to do so on numerous occasions, and finally acts 2 months after complaint has issued, General Counsel has satisfied this burden.

Respondent defends that it conducted a good-faith investigation of Wojcik's grievance in December and determined that the evidence did not support his position. It appears to me, however, that the investigation was a half-hearted one that did not adequately investigate the grievance. Esopa did, eventually, speak to four crewmembers of the tanker who were present on March 6. But each said that while they were on the deck after pulling the lines they did not see Wojcik. This does not conflict with Wojcik's testimony that because he spilled the vinyl thinner on his pants and into his shoes he went to his locker to wash it off. That is not to say that a union must conduct extensive investigations of every grievance filed. But in the circumstances of this case, where the Respondent did nothing about Wojcik's grievance for 9 months, and did not act until 2 months after the complaint issued, the inescapable conclusion is that the Respondent conducted this investigation solely to cover itself and defend itself from the instant complaint. It was too late and not enough.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(b)(1)(A) of the Act by failing to represent Francis Wojcik for reasons which are unfair, arbitrary, invidious, and a breach of the fiduciary duty owed the employees it represents, by failing to properly consider and process the grievance he filed regarding his discharge.

[6] Although the evidence establishes that the destinations of the Company's tramp tankers such as the *Mormac Sky* are difficult to anticipate, Respondent produced no evidence that prior to December it attempted to locate any of the crewmembers who were no longer on the ship. Respondent had, or could easily have obtained, the names of the crewmembers present on March 6, and clearly had their addresses as most, if not all, were members of Respondent. Esopa's subsequent investigation established that this would have been fruitful.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. As Respondent elected to litigate the merits of the grievance at a subsequent supplemental hearing, pursuant to *Mack-Wayne II*, supra, no finding will be made on that subject at this time.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Unlicensed Division, District No. 1–MEBA/NMU, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Failing and refusing to represent employees in bargaining units which it represents for reasons that are arbitrary, invidious, and unfair.

(b) In any like or related manner restraining or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its offices, meeting places, and other facilities copies of the attached notice marked ''Appendix.''[8] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that a supplemental hearing be held at which time the sole issue will be the merits of Wojcik's grievance.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''